Office - Supreme Court, U.S.
FILED
JUN 18 1984
ALEXANDER L. STEVAS,
CLERK

(6)

No. 83-773

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF OREGON, *Petitioner*,

v.

MICHAEL JAMES ELSTAD, *Respondent*.

On Writ Of Certiorari To The Court Of Appeals Of The State Of Oregon

---

BRIEF FOR RESPONDENT

---

*GARY D. BABCOCK
Public Defender of Oregon
STEPHEN J. WILLIAMS
Deputy Public Defender
1655 State Street
Salem, Oregon 97310
Telephone: (503) 378-3349
Counsel for Respondent

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

36 pp

BEST AVAILABLE COPY

QUESTION PRESENTED

Where a first confession from a suspect has been obtained by an arresting officer during custodial interrogation without *Miranda* warnings, should a second confession by the suspect to the same officer be excluded from evidence in a case in which the only significant intervening factor between the confessions is the giving of *Miranda* warnings?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. The Failure Of The Police To Give Elstad *Miranda* Warnings Prior To The Initial Interrogation At His House Deprived Elstad Of His Right Against Compulsory Self-Incrimination	6
II. Elstad's Written Confession Was Properly Excluded As Fruit Of The Earlier Oral Confession. *Miranda* Warnings Alone Cannot Dissipate The Taint Of An Earlier Custodial Confession Made Without *Miranda* Warnings	11
A. The Oregon Court of Appeals properly concluded that Elstad's written confession was tainted by his earlier oral confession	11
B. *Miranda* warnings, by themselves, are insufficient to remove the taint of the prior inadmissible confession	15
C. The decision of the Oregon Court of Appeals is consistent with *United States* v. *Bayer*, 331 U.S. 532 (1974)	22
III. Exclusion Of Elstad's Written Confession Is Consistent With The Rationales For The Exclusionary Rule	23
CONCLUSION	28

TABLE OF AUTHORITIES

CASES:	Page
Brunson v. *State*, 264 So.2d 817 (Miss. 1972)	12
Brown v. *Illinois*, 422 U.S. 590 (1975)	*passim*
Cady v. *Dombroski*, 413 U.S. 433 (1973)	8
Cagle v. *State*, 221 So.2d 119 (Ala. App. 1969)	12
Commonwealth v. *Brittain*, 455 Pa. 562, 317 A.2d 219 (1974)	12
Commonwealth v. *Ware*, 438 Pa. 517, 265 A.2d 790 (1970)	12
Elkins v. *United States*, 364 U.S. 206 (1960)	25
Escobedo v. *Illinois*, 378 U.S. 478 (1964)	25
Evans v. *United States*, 375 F.2d 355 (8th Cir. 1969)	12
Fisher v. *Scafati*, 439 F.2d 307 (1st Cir. 1971)	12
Gilpin v. *United States*, 415 F.2d 638 (5th Cir. 1969)	12
Harney v. *United States*, 407 F.2d 586 (5th Cir. 1969)	12
Harrison v. *United States*, 392 U.S. 219 (1968)	*passim*
Johnson v. *New Jersey*, 384 U.S. 719 (1966)	7
Mallory v. *United States*, 354 U.S. 449 (1957)	12
Michigan v. *Tucker*, 417 U.S. 433 (1974)	*passim*
Miranda v. *Arizona*, 384 U.S. 436 (1966)	*passim*
Nardone v. *United States*, 308 U.S. 338 (1939)	23, 24
Orozco v. *Texas*, 394 U.S. 324 (1969)	8
People v. *Algeien*, 180 Colo. 1, 501 Pl2d 468 (1972)	12
Randall v. *Estelle*, 492 F.2d 118 (5th Cir. 1974)	12
Rhode Island v. *Innis*, 446 U.S. 291 (1980)	8
Silverthorne Lumber Co. v. *United States*, 251 U.S. 385 (1920)	22, 24
State v. *Edwards*, 284 N.C. 76, 199 S.E.2d 459 (1973)	21
State v. *Elstad*, 61 Or. App. 673, 658 P.2d 552 (1983)	*passim*
State v. *Lekas*, 201 Kan. 579, 442 P.2d 11 (1968)	12
Steagald v. *United States*, 451 U.S. 204 (1981)	8
United States v. *Bayer*, 331 U.S. 532 (1947)	22, 23
United States v. *Ceccolini*, 435 U.S. 268 (1978)	24

Table of Authorities Continued

	Page
United States v. *Nash*, 563 F.2d 1166 (5th Cir. 1977)	12, 20
United States v. *Toral*, 536 F.2d 893 (9th Cir. 1976)	20
Weeks v. *United States*, 232 U.S. 383 (1914)	23
Westover v. *United States*, 384 U.S. 436 (1966)	20
Wong Sun v. *United States*, 317 U.S. 471 (1963)	*passim*
CONSTITUTIONAL PROVISIONS:	
U.S. Const., Amend. IV	*passim*
U.S. Const., Amend. V	*passim*
U.S. Const., Amend. VI	6
OTHER AUTHORITIES:	
Aubrey and Caputo, *Criminal Interrogation* (1st ed. 1965)	28
Inbau & Reid, *Criminal Interrogation and Confessions*, 31 (2d ed. 1967)	27
Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 Mich. L. Rev. 59 (1966)	28
Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 Den. L. J. 1 (1979)	27
Lynch, *Interrogation of Criminal Defendants—Some Views on Miranda* v. *Arizona*, 35 Fordham L. Rev. 255 (1966)	28
Medalie, Zeitz and Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 Mich. L. Rev. 1347 (1968)	27
Oregon State Police Manual 101-103 (1979)	9, 27
Project, *Interrogation in New Haven: The Impact of Miranda*, 76 Yale L. J. 1519 (1967)	27
Seeburger & Wettick, *Miranda in Pittsburgh—A Statistical Study*, 29 U. Pitt. L. Rev. 1 (1967)	28
Stephens, Flanders & Cannon, *Law Enforcement and the Supreme Court: Police Perceptions of the Miranda Requirements*, 39 Tenn. L. Rev. 407 (1972)	27

Table of Authorities Continued

	Page
White, *Police Trickery in Inducing Confessions*, 127 U. Pa. L. Rev. 581 (1979)	27
Younger, *Interrogation of Criminal Defendants—Some Views on Miranda* v. *Arizona*, 35 Fordham L. Rev. 255 (1966)	28

STATEMENT OF THE CASE

Statement Of Facts

Sheriff Deputies Burke and McAllister went to Michael Elstad's house during the afternoon of December 17, 1981, with an arrest warrant charging Elstad with a burglary at a neighbor's house (J.A. 8-9). Elstad's mother answered the door (J.A. 8, 18). McAllister and Burke identified themselves as police officers and asked to speak with Elstad (J.A. 18). Mrs. Elstad said Michael was in his bedroom. The officers asked her to show them the bedroom, and she complied (J.A. 9, 19).

McAllister testified the officers "went in there and got Mr. Elstad dressed and out of bed" (J.A. 9). Elstad was laying on the bed under a sheet or blanket to about his waist (J.A. 26). He was wearing only a pair of shorts (J.A. 18). Burke testified they asked Elstad to get up and get dressed (J.A. 19). Both officers remained in the bedroom while Elstad dressed himself (J.A. 26-27). They then took Elstad to the living room (J.A. 19).

McAllister "took" Mrs. Elstad to the kitchen to explain to her why they were there (J.A. 9, 19). He testified:

> "Q. [BY HALBLEIB:] Now, what was your purpose in taking Mrs. Elstad in the kitchen area?
>
> "A. [MCALLISTER:] She was not completely aware of why we were there. Obviously creates some tension and stress for her when we take the young fellow out of bed, so I explained to her." (J.A. 9).

McAllister felt that Mrs. Elstad had a right to know what was going on.

McAllister testified Elstad was arrested when he was taken to the living room (J.A. 10). Burke testified the arrest occurred in the bedroom, although Elstad was not told he was under arrest (J.A. 27).

Burke sat down with Elstad in the living room (J.A. 19). Burke testified the following then occurred:

> "A. I sat down with Mr. Elstad and I asked him if he was aware of why Detective McAllister and myself were there to talk with him. He stated no, he had no idea why we were there. I then asked him if he knew a person by the name of Gross, and he said yes, he did, and also added that he heard that there was a robbery at the Gross house. And at that point I told Mr. Elstad that I felt he was involved in that, and he looked at me and stated, 'Yes, I was there.' "
>
> (J.A. 19-20).

On cross-examination, Burke testified:

> "Q. [BY DEPENBROCK:] You got to the living room.
>
> "A. [BURKE:] Yes.
>
> "Q. Defendant sat down and you stood up.
>
> "A. Yes.
>
> "Q. And then you initiated—you said something.
>
> "A. Yes, I did, I said, 'You know why we're here.'
>
> "Q. And what was his response[sic] to that?
>
> "A. His response was no, he did not know why we were there.
>
> "Q. And what did you say following that?
>
> "A. I asked him if he knew a Mr. Gross.
>
> "Q. That was your exact words, 'Do you know Mr. Gross?'
>
> "A. It may not have been the exact words, but it was basically the exact words. I may have said do you know the Gross family or do you know Mr. Gross or very similar words to that effect.

> "Q. Did you say anything like I have reliable information that you're involved in a burglary?
>
> "A. I don't recall that.
>
> "Q. And in response to your question to him as to whether or not he knew Mr. Gross, what, if anything, did the defendant say or do?
>
> "A. He looked around a little bit toward the kitchen to where his mother was and looked back at me and fidgeted just a bit and said he had heard about the burglary.
>
> "Q. Okay.
>
> "A. And I asked what he knew about the burglary, and he said, 'I was there.'
>
> "Q. You asked him what do you know about the burglary?
>
> "A. Yes.
>
> "Q. Okay. At any time prior to making any of these statements or hearing anything of the defendant, did you advise him of his rights, what are commonly known as Miranda rights?
>
> "A. Not at that point." (J.A. 28-29).

Elstad was placed in the officers' patrol car. His father came home while he was in the car (J.A. 20). The elder Elstad became agitated and began to reprimand his son. Burke asked Mr. Elstad to step back (J.A. 21).

Burke and McAllister responded to a robbery report while they were driving Elstad to the sheriff's office (J.A. 32). Elstad remained in the patrol car while the officers investigated the robbery (J.A. 32-33). Elstad was subsequently driven to the sheriff's office in another patrol car (J.A. 33).

Burke and McAllister arrived at the jail 45-60 minutes after leaving defendant's house (J.A. 11, 33). McAllister

gave Elstad *Miranda* warnings (J.A. 21-22). Elstad signed a constitutional rights waiver card and gave a written statement admitting he participated in the burglary (J.A. 11, 13, 21-22). Burke, McAllister and Elstad were the only people present when the confession was made (J.A. 14).

SUMMARY OF ARGUMENT

I.

Elstad was interrogated by the police after he was arrested at his house. He was in custody at the time, and *Miranda* warnings were not given before the interrogation. He admitted participating in a burglary in response to a police officer's accusation that he was involved in the crime.

Elstad's initial confession was obtained in violation of his right against compulsory self-incrimination because the police failed to give him any *Miranda* warnings before the interrogation. The failure to give *Miranda* warnings was a flagrant violation of Elstad's Fifth Amendment right against compulsory self-incrimination.

II.

The fruit of the poisonous tree doctrine applies to a second confession obtained after a person has previously confessed during a custodial interrogation without benefit of *Miranda* warnings. The second confession is presumptively tainted by the initial unconstitutionally obtained confession.

In deciding whether the second conviction is admissible, the Court must decide whether there has been a break in the stream of events sufficient to remove the taint of the first confession. The Court must look to objective factors in making this determination. The Oregon

Court of Appeals correctly applied the fruit of the poisonous tree doctrine in this case.

III.

Miranda warnings alone cannot remove the taint of an earlier custodial confession made without *Miranda* warnings. The adoption of such a rule would substantially dilute the exclusionary rule in the Fifth Amendment context. Any incentive to avoid Fifth amendment violations would be eviscerated by making *Miranda* warnings a cure-all in cases in which the police have interrogated a person in custody without warnings and obtained a confession.

IV.

Exclusion of Elstad's written confession by the Oregon Court of Appeals was consistent with the "cat out of the bag" analysis first mentioned in *United States* v. *Bayer*, 331 U.S. 532 (1947).

V.

Exclusion of Elstad's written confession is consistent with the rationales of the exclusionary rule. The written confession was tainted by Elstad's earlier oral confession. Exclusion furthers the goal of protecting persons against police violations of the Fifth Amendment and the constitutional safeguards established in *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Exclusion protects the courts from receiving illegal and unreliable evidence.

The deterrence rationale of the exclusionary rule is well served by exclusion of Elstad's written confession. All police officers understand that when they arrest a person with a warrant they must give the person *Miranda* warnings before interrogation. The giving of the warnings and adherence to the principles of the *Miranda* deci-

sion will be greatly encouraged if police know that both a custodial confession obtained without warnings and a subsequent non-attenuated confession will be excluded from evidence.

ARGUMENT

I.

The Failure Of The Police To Give Elstad Miranda Warnings Prior To The Initial Interrogation At His House Deprived Elstad Of His Right Against Compulsory Self-incrimination.

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court extended the greater protections inherent in the Sixth Amendment right to counsel to Fifth Amendment custodial encounters. To dispel the subtle compulsion inherent in custodial interrogation, the Court established "critical safeguards" for the right and promulgated concrete constitutional guidelines which must be followed in order to honor the exercise of the right.

The *Miranda* warnings were created to protect the right against compulsory self-incrimination. In the *Miranda* opinion, the Court stated that it "might not find the defendants' statements to have been involuntary in traditional terms." 384 U.S. 457. That did not prevent the Court from holding that the defendants' Fifth Amendment rights had been violated by the failure to give full warnings:

> "The *constitutional issue* we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way * * *" 384 U.S. at 445 (Emphasis added).

The *Miranda* Court recognized that compulsion is inherent in custodial surroundings. A statement obtained from a person in such surroundings is not truly the product of a person's free choice "unless adequate protective devices are employed to dispel the compulsion." 384 U.S. at 458. Both inculpatory and exculpatory statements are excluded from a criminal trial if they are obtained during custodial interrogation without adequate *Miranda* warnings.

This Court's decision in *Michigan* v. *Tucker*, 417 U.S. 433 (1974), is highly relevant to the resolution of the instant case. Tucker sought to suppress the testimony of a witness whose identity the police learned from Tucker during custodial interrogation. The interrogation took place before the *Miranda* decision, but *Miranda* applied because Tucker's trial was after that decision. *See Johnson* v. *New Jersey*, 384 U.S. 719 (1966). The police told Tucker he had the right to remain silent and to an attorney and that any statements he might make could be used against him in court. He was not told that an attorney would be appointed for him if he was indigent. Therefore, the *Miranda* warnings were incomplete, and Tucker's statements to the police were excluded from his trial.

This Court held that the witness' testimony against Tucker was admissible. In reaching that holding, the Court found that Tucker was not deprived of his right against compulsory self-incrimination by the failure of the police to "make available to him the full measure of procedural safeguards associated with that right since Miranda." 417 U.S. at 444. The opinion further states:

> "* * * The District Court in this case noted that the police had 'warned [respondent] that he had the right to remain silent,' 352 F Supp 266, 267 (1972), and the record in this case clearly shows that respondent was informed that any evidence taken could be used against him.' The record is also clear that respondent was asked whether he wanted an attorney and that he replied that he did not. Thus, his state-

ments could hardly be termed involuntary as that term has been defined in the decisions of this Court. * * * " 417 U.S. at 444-445 (footnotes omitted).

There was "no compulsion sufficient to breach the right against compulsory self-incrimination." 417 U.S. at 445. There was, however, an "inadvertent disregard" of the procedural rules established in *Miranda*. *Id.* In most important respects Tucker was advised of his rights. The Court also noted that no right of the witness was violated by the failure to completely warn Tucker.

The facts of the instant case are different from *Tucker*. Elstad was interrogated[1] while in custody[2] without any *Miranda* warnings. The police did not simply omit one of the warnings as in *Tucker*. The facts of this case are particularly offensive. The officers made no attempt to comply with *Miranda*, although they had an arrest warrant, and both officers believed Elstad was under arrest at the time.

The clear rule of *Miranda* is that the warnings are required before custodial interrogation. Any police offic-

---

[1] There is no dispute that Elstad was "interrogated" for purposes of *Miranda* when he was initially questioned at his house. *Rhode Island* v. *Innis*, 446 U.S. 291, 300-301 (1980).

[2] The state has always conceded that Elstad was in "custody" for purposes of *Miranda*. (Petitioner's Brief p. 5). The Solicitor General, as amicus curiae, argues that Elstad's first confession did not occur during custodial interrogation. (Brief for the United States pp. 12-13). There is no merit to the contention that *Miranda* warnings were not required prior to the first interrogation. Elstad was in custody at the time. *Orozco* v. *Texas*, 394 U.S. 324 (1969).

The Solicitor General should be precluded from claiming the absence of custody for the first time in this Court, because the state failed to raise and argue this issue in the Oregon courts. *Steagald* v. *United States*, 451 U.S. 204, 208-209 (1981); *Cady* v. *Dombrowski*, 413 U.S. 433, 442 (1973).

er, even a rookie working his first shift, must be expected to understand that rule.[3] Yet the officers in this case chose to disregard this mandate.

The state and the Solicitor General repeatedly attempt to diminish the seriousness of the officers' failure to give Elstad *Miranda* warnings before the first interrogation. The state asserts that there was "nothing particularly offensive" about the failure to give *Miranda* warnings. (Petitioner's Brief p. 41). On a record that is silent on the point, the state speculates that the omission was probably through inadvertence or because the officers somehow failed to understand what constitutes "custody" for *Miranda* purposes. (Petitioner's Brief pp. 39-40). The Solicitor General claims that the failure to give warnings was at worst a "technical" violation of *Miranda*. It is surprising that, 18 years after the *Miranda* opinion, experienced state and federal prosecutors take such a cavalier view of the basic teaching of that landmark decision.[4]

---

[3] The record shows that Officer Burke had been a deputy sheriff for about three years (J.A. 25). The record is silent about Officer McAllister's experience. All Oregon police officers in the course of their initial trianing receive detailed instructions on arrest procedures, interrogation techniques, and the absolute requirement of giving *Miranda* warnings before commencing custodial interrogation. For example, Oregon State Police Officers carry copies of the *Oregon Police Manual* (1979) fully detailing the arrest and *Miranda* procedures.

[4] The argument of the state and the Solicitor General that there was little inherently coercive about the living room interrogation is rebutted by Officer McAllister's testimony. He testified he took Mrs. Elstad to the kitchen so explain why they were there because the situation "[o]bviously creates some tension and stress for her when we take the young fellow out of bed, so I explained to her" (J.A. 9). McAllister felt Mrs. Elstad had a right to know what was going on (J.A. 10). It is beyond question that greater tension and stress will be

It is not difficult to understand that when a person is arrested pursuant to a warrant the person is in custody and *Miranda* warnings are required before interrogation. Both officers testified they believed Elstad was under arrest before the interrogation at his house. Their failure to give Elstad *Miranda* warnings was not a technical violation of *Miranda*. This Court stated in *Miranda*:

> "Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. We have concluded that without proper safeguards the process of incustody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." 384 U.S. at 467.

The failure of the police to give any *Miranda* warnings before custodial interrogation deprives an arrestee of his

---

experienced by a person who is actually arrested. Notwithstanding the officer's testimony, the state asserts that "the setting was casual and relaxed." (Petitioner's Brief p. 39). The record simply does not support that conclusion.

While McAllister felt that Mrs. Elstad had a right to know what was going on, Burke clearly did not believe Elstad had that right when he was first questioned. Burke asked Elstad if he knew why the police were there to talk to him. Elstad said he had no idea why they were there. Burke did not then tell Elstad why they were there. Rather, he began to question him about the burglary.

right against compulsory self-incrimination. A confession obtained without warnings may or may not be involuntary in the sense that it is a result of the arrestee's overborne will caused by police use of the "third degree." That confession, however, is involuntary and inadmissible as a matter of law because the police violated the arrestee's right against compulsory self-incrimination. This is in contrast to the situation in *Michigan* v. *Tucker*, 417 U.S 433 (1974), where the right against compulsory self-incrimination was not violated, because there was only inadvertent disregard of a portion of the procedural rules established in *Miranda*. In addition, the warning in *Tucker* occurred before the *Miranda* decision and included advisal of the rights to remain silent and to an attorney and that anything Tucker said could be used against him in court. The Oregon Court of Appeals correctly held that Elstad's first confession was "unconstitutionally obtained." *State* v. *Elstad*, 61 Or. App. 673, 658 P.2d 552 (1983) (Petition for Certiorari, Appendix A p. 4).

The state's argument that the officers' failure to give Elstad *Miranda* warnings before custodial interrogation at his house did not deprive him of his right against compulsory self-incrimination fails in light of *Michigan* v. *Tucker*, 417 U.S. 433 (1974) and *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

II.

Elstad's Written Confession Was Properly Excluded As Fruit Of The Earlier Oral Confession. Miranda Warnings Alone Cannot Dissipate The Taint Of An Earlier Custodial Confession Made Without Miranda Warnings.

A. The Oregon Court of Appeals properly concluded that Elstad's written confession was tainted by his earlier oral confession.

Elstad's written confession was tainted by his earlier oral confession and properly excluded as fruit of the poiso-

nous tree.[5] The fruit of the poisonous tree doctrine applies to consecutive confession cases.

Another highly relevant case is *Harrison* v. *United States*, 392 U.S. 219 (1968). Harrison was tried for felony murder and the prosecution introduced three confessions he allegedly made while in the custody of the police. Harrison testified he was present when the victim died but the death was accidental. A federal appeals court reversed the conviction on the ground that the confessions were obtained in violation of the rule of *Mallory* v. *United States*, 354 U.S. 449 (1957). (Interpreting a Rule of Federal Criminal Procedure, requiring that a person under arrest must be taken to a committing magistrate without unnecessary delay).

At Harrison's retrial, the government introduced a transcript of his testimony at the previous trial. Harrison was again convicted and appealed, arguing that the transcript of the prior testimony should have been excluded from the retrial as fruits of the illegally obtained confessions. This Court held that the trial testimony was tainted and should have been suppressed.

The facts of *Harrison* are obviously different from the facts of the instant case. It is important, however, that

[5] The analysis of the Oregon Court of Appeals is consistent with both state and lower federal court decisions. *See United States* v. *Nash*, 563 F.2d 1166 (5th Cir. 1977); *Randall* v. *Estelle*, 492 F.2d 118 (5th Cir. 1974); *Fisher* v. *Scafati*, 439 F.2d 307 (1st Cir. 1971); *Gilpin* v. *United States*, 415 F.2d 638 (5th Cir. 1969); *Harney* v. *United States*, 407 F.2d 586 (5th Cir. 1969); *Evans* v. *United States*, 375 F.2d 355 (8th Cir. 1969); *Commonwealth* v. *Brittain*, 455 Pa. 562, 317 A.2d 219 (1974); *People* v. *Algeien*, 180 Colo. 1, 501 P.2d 468 (1972); *Brunson* v. *State*, 264 So.2d 817 (Miss. 1972); *Commonwealth* v. *Ware*, 438 Pa. 517, 265 A.2d 790 (1980); *Cagle* v. *State*, 221 So.2d 119 (Ala. App. 1969); *State* v. *Lekas*, 201 Kan. 579, 442 P.2d 11 (1968).

the *Harrison* Court did apply the fruit of the poisonous tree doctrine to suppress evidence obtained as the result of inadmissible confessions that were not involuntary in the traditional sense. 392 U.S. at 233 (White dissenting). The opinion states:

> ". . . The question is not *whether* the petitioner made a knowing decision to testify, but *why*. If he did so in order to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible. . . .
>
> * * * * *
>
> "The remaining question is whether the petitioner's trial testimony was in fact impelled by the prosecution's wrongful use of his illegally obtained confessions. It is, of course, difficult to unravel the many considerations that might have led the petitioner to take the witness stand at his former trial. But, having illegally placed his confessions before the jury, the Government can hardly demand a demonstration by the petitioner that he would not have testified as he did if his inadmissible confessions had not been used. . . ." 392 U.S. at 223 (footnote omitted, emphasis in original).

The same approach should apply to a second custodial confession made after a confession which is inadmissible because the police failed to give *Miranda* warnings.

The Court in *Michigan* v. *Tucker*, 417 U.S. 433 (1974), after concluding that Tucker's right against compulsory self-incriminatin had not been abridged, went on to decide as a "question of principle" whether the witness' testimony should have been excluded from the trial. 417 U.S. at 446. The Court observed that the prime purpose of the exclusionary rule in the Fourth Amendment search-and-seizure context is to deter future unlawful

police conduct. The Court then stated, "In a proper case this rationale would seem applicable to the Fifth Amendment context as well." 417 U.S. at 447.

Therefore, when a person's right against compulsory self-incrimination has been deprived, the exclusionary rule should apply to both the statements obtained without warnings and evidence obtained as a result of the statements under the same analysis developed in Fourth Amendment cases. *See Brown* v. *Illinois*, 422 U.S. 590 (1975); *Wong Sun* v. *United States*, 317 U.S. 471 (1963). In order to be admissible at trial, derivative evidence must not be tainted fruit of the poisonous tree.

Elstad's oral confession was made at his house shortly after the officer began questioning him about the burglary. He was in his bed listening to a stereo when the officers first encountered him. Elstad was wearing only a pair of shorts. The officers told Elstad to get dressed and come to the living room. According to Officer McAllister, they "went in there and got Mr. Elstad dressed and out of bed." (J.A. 9). Officer McAllister took Mrs. Elstad to the kitchen and told her that they had an arrest warrant for her son. Meanwhile, Officer Burke took Elstad to the living room where the interrogation took place on a couch. No *Miranda* warnings were given.

The officer told Elstad that he felt Elstad was involved in the burglary. Elstad then admitted involvement by stating "Yes, I was there." The officer broke off the interrogation after the admission was obtained. The police drove Elstad to the county jail/police station, where the same two officers interrogated Elstad in McAllister's office. Elstad was given *Miranda* warnings before this interrogation and he signed a waiver card. His written confession then followed.

The only significant intervening facts between the two confessions in this case were the move to the police station and the giving of *Miranda* warnings before the second interrogation. Elstad was continuously in police custody from the time he first encountered the police in his bedroom.

The Oregon Court of Appeals looked at the facts of this case to determine if there was a sufficient break in the stream of events to remove the taint of the first illegally obtained confession. The court applied the correct analysis. The opinion states:

> "The state does not dispute that the statement elicited from defendant at his home was inadmissible. Our inquiry here is whether there was a suffucient break in the stream of events between that inadmissible statement and the written confession to insulate the latter statement from the effect of what went before. *Clewis* v. *Texas*, 386 US 707, 87 S Ct 1338, 18 L Ed 2d 423 (1967); *State* v. *Mendacino*, 288 Or 231, 603 P2d 1376 (1979)."

State v. *Elstad*, 61 Or. App. 673, 676, 658 P.2d 552 (1983). (Petition for Certiorari, Appendix A p. 3).

The move to the jail was not sufficient. The police controlled Elstad at all times. For example, when Elstad's father became agitated and began berating his son as he was sitting in the police car, the police moved the father away.

B. *Miranda* warnings, by themselves, are insufficient to remove the taint of the prior inadmissible confession.

The only intervening factor that could possibly have broken the stream of events and dissipated the taint of the first confession was the giving of *Miranda* warnings before the second interrogation. The Oregon Court of Appeals properly rejected the state's argument that the

warnings were adequate to insulate the second confession in this case. This Court should clearly hold that *Miranda* warnings alone are insufficient to remove the taint of a custodial confession obtained without warnings, where a person makes a later custodial confession to the same crime. Such a holding is consistent with the approach taken by this Court in *Brown* v. *Illinois*, 422 U.S. 590 (1975).

The defendant in *Brown* was arrested without probable cause and without a warrant. The purpose of the arrest was to question him about a murder. He was given full *Miranda* warnings before an interrogation in which he gave two inculpatory statements. The issue in the case was "whether the statements were to be excluded as the fruit of the illegal arrest, or were admissible because the giving of the *Miranda* warnings sufficiently attenuated the taint of arrest." 422 U.S. at 591-592. This Court expressly rejected the argument that *Miranda* warnings, by themselves, may attenuate the taint of an unconstitutional arrest:

> "If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. See Davis v Mississippi, 394 US 721, 726-727, 22 L Ed 2d 676, 89 S Ct 1394 (1969). Arrests made without warrant or without probable cause, for questioning or 'investigation,' would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving Miranda warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a 'cure-all,' and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to 'a form of

> words.' See Mapp v Ohio, 367 US, at 648, 6 L Ed 2d 1081, 81 S Ct 1684, 87 ALR2d 933." 422 U.S. at 602-603 (footnote omitted).

The Court's reasoning in *Brown* applies with equal force in the instant case. There is no principled reason to hold that *Miranda* warnings, by themselves, attenuate the taint of a custodial confession obtained without warnings. The failure to give warnings deprives a person of his right against compulsory self-incrimination. The Fifth Amendment violation should be treated the same as the Fourth amendment violation was in *Brown*.

The Court in *Brown* also rejected a "but for" rule. The defendant in *Brown* did not, and Elstad does not, urge the adoption of such a rule. Rather, the approach employed in *Brown* should apply in the Fifth Amendment context here:

> "* * * The question whether a confession is the product of a free will under Wong Sun must be answered on the facts of each case. No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test. The Miranda warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, see Johnson v Louisiana, 406 US 356, 365, 32 L Ed 2d 152, 92 S Ct 1620 (1972), and, particularly, the purpose and flagrancy of the official misconduct are all relevant. See Wong Sun v United States, 371 US, at 491, 9 L Ed 2d 441, 83 S Ct 407. The voluntariness of the statement is a threshold requirement. Cf. 18 USC § 3501 [18 USCS § 3501]. And the burden of showing admissibility rests, of course, on the prosecution." 422 U.S. at 603 (footnotes moitted).

The state argues "[w]here an initial confession is excluded solely as a result of the failure to give *Miranda* warnings, the subsequent advisal of *Miranda* warnings and valid waiver of rights effectively remove the prior illegality. This result should follow as a matter of law." (Petitioner's Brief pp. 24-25).

This argument virtually renders meaningless the initial failure to give *Miranda* warnings to a person before custodial interrogation. Again, the state attempts to show that there was really nothing or very little that was done wrong by the police in this case. Again, it is submitted that the failure to give *Miranda* warnings was a fundamental and most serious violation of the *Miranda* rules. The state is urging the adoption of a qualified *per se* rule of attenuation as a substitute for principled analysis on an objective case by case basis. Such an analysis is required by *Brown* in the context of a confession following a Fourth Amendment violation and should be required in the Fifth Amendment context.

The state recognizes that the *Miranda* decision established an objective test and created a presumption that custodial interrogation is coercive. Statements obtained during custodial interrogation without *Miranda* warnings are presumed to be the result of coercion. They are inadmissible for that reason.

The subsequent giving of *Miranda* warnings before a second custodial interrogation cannot alone rebut the presumption that a second confession is tainted by the first illegally obtained confession. *Brown* v. *Illinois*, 422 U.S. 590 (1975). The subsequent warnings do not reestablish the fair individual-state balance that the *Miranda* decision attempted to assure, because the police have taken advantage of the person's infirmity and worsened his position by improperly eliciting a confession. In order

to re-establish the pre-interrogation individual-state balance, something in addition to the *Miranda* warning must be required to counter the unfairly induced confession.

The Oregon Court of Appeals presumed that Elstad's first confession was the result of coercion inherent in custodial interrogation. This was consistent with the *Miranda* decision. The court also presumed that the taint of the first confession carried over the the second confession unless something broke the stream of events and attenuated the second confession. The Oregon court looked to objective factors to determine whether the second confession was tainted by the first. The court's approach was wholly consistent with the fruit of the poisonous tree doctrine. The opinion states:

> "Conceding that the flagrancy of police misconduct is a factor in another 'fruit of the poisonous tree' context and that it may be a factor in the analysis of the 'total circumstances of each case' that we must make in these successive interrogation cases, *State v. Mendacino*, *supra*, 288 Or at 238, we disagree that it is a factor of sufficient significance to distinguish this case from *Hibdon*. The state's analysis denigrates the importance of *Miranda* v. *Arizona*, *supra*, in which the court held that the warnings were mandatory in order to protect Fifth Amendment rights against 'the compulsion inherent in custodial surroundings.' 384 US at 458. Regardless of the absence of actual compulsion, the coercive impact of the unconstitutionally obtained statement remains, because in a defendant's mind it has sealed his fate. It is this impact that must be dissipated in order to make a subsequent confession admissible. In determining whether it has been dissipated, lapse of time and change of place from the original surroundings are the most important considerations. *See Westover* v. *United States*, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694 (1966)." 61 Or. App. at 677 (footnote omitted).

The Oregon court properly rejected the *Miranda* warnings, by themselves, as being sufficient to remove the taint of the first confession. The court then concluded there were no other relevant factors which broke the stream of events. The court properly focused on the time interval of 45-60 minutes between interrogations and the move of defendant by the police from his home to the police station. *Westover* v. *United States*, 384 U.S. 436 (1966). The court's decision is consistent with the fruit of the poisonous tree doctrine. *Brown* v. *Illinois*, 422 U.S. 590 (1975); *Wong Sun* v. *United States*, 371 U.S. 471 (1963). In addition, the failure to give *Miranda* warnings was a flagrant violation of the *Miranda* decision. *See: Brown* v. *Illinois*, 422 U.S. at 604; *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974).[6]

---

[6] The state argues that *United States* v. *Toral*, 536 F.2d 893 (9th Cir. 1976) is on point. That court looked to whether the conditions that rendered the pre-warning admissions inadmissible carried over to taint the defendant's second confession. On the facts of that case, the court held that the second confession was admissible.

In *Toral*, federal agents went to the defendant's home with a warrant to search it for drugs. The agents were admitted by the defendant's wife, and several persons were inside, some of whom were suspected of being involved in narcotics trafficking. An agent found a brown paper bag containing heroin in a bedroom. The agent asked defendant who the bedroom and bag belonged to. The defendant said they were his. The defendant was arrested and given *Miranda* warnings. He then admitted he had received some heroin and was holding it because of the money involved.

The *Toral* court noted that the original questions were "in the form of preliminary questions that may have been asked of anyone to narrow the field of suspects." 536 F.2d at 896. The *Toral* court reached the wrong result. While the police did not have an arrest warrant for Toral, the questioning was improper under *Miranda*. Furthermore, as in the instant case, the only relevant intervening factor was the giving of *Miranda* warnings. The second confession was presumptively tainted and should have been excluded in *Toral*. *See e.g. United States* v. *Nash*, 563 F.2d 1166 (5th Cir. 1977).

There can be no question that Elstad initially admitted he was involved in the burglary. Officer Burke told him he believed he was involved. Elstad replied, "Yes, I was there." The police believed Elstad was involved when they went to arrest him. Elstad's initial admission supported the officers' belief.

This might be a different case if the police had only failed to give Elstad part of the *Miranda* warnings. *See Michigan* v. *Tucker*, 417 U.S. 433 (1974). This case might also be different if something more than *Miranda* warnings occurred before the second interrogation. For example, the police could have told Elstad his first statement could not be used against him.[7] Elstad could have been allowed to meet with and consult a lawyer. Different considerations would be present if a defendant indicated that he knew his first statement was not admissible, even if the police did not tell him that (*i.e.* statements by a defendant that he had been given *Miranda* many times and understood what the rights meant from his prior encounters with the police).

The state speculates on a silent record that Elstad most likely did not believe that his initial confession "sealed his fate" (Petitioner's Brief p. 33). Of course, the opposite inference is just as likely. The Oregon Court of Appeals had no difficulty concluding the statement was "significantly inculpatory." 61 Or. App. at 678. The state also

---

[7] This has been suggested as a dispositive attenuation factor. *See State* v. *Edwards*, 284 N.C. 76, 199 S.E.2d 459 (1973). The police should clearly understand that when someone is arrested and interrogated *Miranda* warnings are required. When a situation arises where a statement has been obtained after an arrest but before *Miranda* warnings, the police should know when they begin a second interrogation that the prior statement will be inadmissible at trial.

notes that Elstad did not testify on the motion to suppress. But that is irrelevant. The state had the burden to show that Elstad's second confession was admissible. *Brown* v. *Illinois*, 422 U.S. 590 (1975); *Harrison* v. *United States*, 392 U.S. 219 (1968).

The Oregon Court of Appeals correctly applied an objective test and concluded that the second confession was tainted by the first.

C. The decision of the Oregon Court of Appeals is consistent with *United States v. Bayer*, 331 U.S. 532 (1947).

Exclusion of Elstad's written confession is consistent with the "cat out of the bag" analysis first mentioned in *United States* v. *Bayer*, 331 U.S. 532 (1947). The state criticizes what it calls a "colorful metaphor." (Petitioner's Brief p. 14). A review of sequential confession cases since *Bayer* reveals that the expression has been widely used by both federal and state courts. The reason for this is probably that it states a truth about human psychology. The original quote is:

> "Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as the fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually diables the confessor from making a usable one after those conditions have been removed." 331 U.S. at 540-541.

The Court in *Bayer* rejected the lower court's holding that the second confession sought to be excluded in that case was the fruit of the earlier inadmissible confession. The lower court relied on *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920) and *Nardone* v. *United States*, 308 U.S. 338 (1939). The *Bayer* Court held "[t]he Silverthorne and Nardone Cases, relied on by the Court of Appeals, did not deal with confessions but with evidence of a quite different category and do not control this question." 331 U.S. at 541. Those cases involved the exclusion of the fruits of evidence illegally seized under the Fourth Amendment.

The *Bayer* Court did not specifically reject the fruit of the poisonous tree doctrine in the Fifth Amendment context. It only held that a person is not perpetually unable to make an admissible confession after making an involuntary confession. Moreover, the Court looked to objective factors in deciding that the second confession was admissible. The Court noted that the second confession was made six months after the first and the only restriction on the defendant when he confessed the second time was that he could not leave the military base to which he was assigned without permission.

The Oregon Court of Appeals looked to similar factors in holding that Elstad's second confession was inadmissible. In doing so, that court was consistent with the fruit of the poisonous tree doctrine as developed by this Court. *See Brown* v. *Illinois*, 422 U.S. 590 (1975); *Harrison* v. *United States*, 392 U.S. 219 (1968); *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

III.

Exclusion of Elstad's Written Confession is Consistent With the Rationales for the Exclusionary Rule.

A number of rationales have been used to justify the exclusionary rule in both Fourth Amendment and Fifth Amendment contexts. In *Weeks* v. *United States*, 232 U.S. 383 (1914), the Court ruled that evidence seized in

violation of the Fourth Amendment could not be introduced in a criminal trial. The Fourth Amendment is self-executing and if the government can use illegally seized evidence to convict a person the Fourth Amendment "might as well be stricken from the Constitution." 232 U.S. at 393. Moreover, to allow the uses of such evidence would place the courts in the position of implicitly condoning the illegal police conduct. The Court stated:

> ". . . To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." 232 U.S. at 394.

In *Silverthorne Lumber Company* v. *United States*, 251 U.S. 385 (1920), the Court held that copies of illegally seized business records could not be used as the basis of a criminal prosecution in a contempt action to require the production of the originals. The use of such evidence would reduce the Fourth Amendment to "a form of words." 251 U.S. at 392. The Court stated:

> ". . . The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." 251 U.S. at 392.

Silverthorne Lumber Company marked the Court's acknowledgment of the fruit of the poisonous tree doctrine. That doctrine has, of course, been applied to the Fourth Amendment by this Court on numerous occasions. *See: Nardone* v. *United States*, 308 U.S. 338 (1939); *Wong Sun* v. *United States*, 371 U.S. 471 (1963); *Brown* v. *Illinois*, 422 U.S. 590 (1975); *But see: United States* v. *Ceccolini*, 435 U.S. 268 (1978). And the doctrine applies as well to Fifth Amendment violations. *Michigan* v. *Tucker*, 417 U.S. 433 (1974); *Harrison* v. *United States*,

392 U.S. 219 (1968). The state acknowledges this fact and does not argue that it should be changed. (Petitioner's Brief p. 25).

The early rationales for the exclusionary rule focused on the protection of individual rights and a belief that courts should not be involved in the use of illegally seized evidence. Later discussions of the exclusionary rule have tended to focus on protecting the courts from the use of unreliable evidence and deterring police from violating constitutional protections in the future. *See e.g. Michigan* v. *Tucker*, 417 U.S. at 446-450; *Brown* v. *Illinois*, 422 U.S. at 499-600; *Escobedo* v. *Illinois*, 378 U.S. 478, 488-489 (1964); *Elkins* v. *United States*, 364 U.S. 206, 217 (1960).

In concluding that the challenged evidence in *Michigan* v. *Tucker*, *supra*, should not have been excluded from the trial, the Court concluded that excluding the witness' testimony would not specifically augment whatever deterrent effect exclusion of Tucker's own statements had already accomplished. 417 U.S. at 447-448. Another significant consideration was that there was no reason to believe the witness' testimony was untrustworthy because Tucker had not been advised of his right to appointed counsel.

The *Tucker* Court also found it was significant that the partial *Miranda* violation occurred before the *Miranda* decision. The officers in that case informed Tucker of his constitutional rights *before* they were required to by the *Miranda* decision. In discussing the deterrence rationale in *Tucker*, the Court said:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refus-

> ing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." 417 U.S. at 447.

In contrast to *Tucker*, Elstad's right against compulsory self-incrimination was violated. And it cannot be said that the police failed to give him *Miranda* warnings in complete good faith. They flagrantly violated *Miranda*.

Exclusion of Elstad's written confession serves the deterrence rationale very well. All police officers understand that when they arrest a person with a warrant they must give the person *Miranda* warnings before interrogation. The giving of the warnings and adherence to the principles of the *Miranda* decision will be greatly encouraged if police know that both a custodial confession obtained without warnings and a subsequent nonattenuated confession will be excluded. *Miranda* simply encourages warnings before interrogation. Exclusion of tainted confessions in this context will deter police from ignoring the warnings.[8]

---

[8] The Solicitor General argues that the deterrence rationale for the exclusionary rule does not apply "to deter police from questioning suspects in custody without warnings, but rather to deter abusive police practices." (Brief for the United States pp. 22-23). This argument demonstrates one of the problems in discussing deterrence. Deterrence implies something negative—the stopping of certain practices. The concept can better be viewed positively. Application of the exclusionary rule in appropriate cases encourages adherence to constitutional protections in instances in which constitutional rights are to be protected. In the instant case, application of the exclusionary rule to the written confession encourages the police to follow *Miranda* in cases in which they are seeking admissions from someone they have already decided committed the crime they are investigating. Such a case is one in which the *Miranda* decision is most applicable.

In addition, exclusion of the written confession in this case will discourage police from questioning an arrestee without *Miranda* just to the point of obtaining an incriminating statement, then breaking off the interrogation in hope that the arrestee will feel he has nothing to lose by confessing again, in more detail, after the giving of *Miranda* warnings. The state's suggested qualified *per se* rule that *Miranda* warnings attenuate a second confession as a matter of law actually encourages this approach by the police (Petitioner's Brief pp. 24-25). An officer who knows later *Miranda* warnings will remove the taint of a custodial statement obtained without warnings may feel that he has little to lose by going ahead and questioning an arrestee without advising him of his constitutional rights.[9]

---

[9] The idea that police would attempt to obtain custodial statements without giving *Miranda* warnings if they knew a second confession would be attenuated by the giving of warnings is not farfetched. Studies indicate law enforcement officials have tended to "push to the limit" any constitutional restraint on their actions. For example, despite having to give *Miranda* warnings, police are able through a variety of techniques to induce the overwhelming majority of suspects to waive the right to counsel. *See* White, *Police Trickery in Inducing Confessions*, 127 U. Pa. L. Rev. 581, 598 (1979); Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 Den. L. J. 1, 26-34 (1979); *Oregon State Police Manual* 101-103 (1979); Stephens, Flanders & Cannon, *Law Enforcement and the Supreme Court: Police Perceptions of the Miranda Requirements*, 39 Tenn. L. Rev. 407 (1972); Medalie, Zeitz and Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 Mich. L. Rev. 1347, 1394-95 (1968); Inbau & Reid, *Criminal Interrogation and Confessions*, 31, 106 (2d ed. 1967); Project, *Interrogation in New Haven: The Impact of Miranda*, 76

Exclusion of Elstad's written confession serves all rationales for the exclusionary rule. Exclusion is consistent with the *Miranda* decision, where the Court held that in the absence of warnings and a valid waiver "no evidence obtained as a result of interrogation can be used against" a person. 384 U.S. at 479.

CONCLUSION

For the above reasons, the judgment of the Oregon Court of Appeals should be affirmed.

Respectfully submitted,

*GARY D. BABCOCK
Public Defender

STEPHEN J. WILLIAMS
Deputy Public Defender
Counsel for Respondent

Yale L.J. 1519, 1614 (1967); Seeburger & Wettick, *Miranda in Pittsburgh—A Statistical Study*, 29 U. Pitt. L. Rev. 1 (1967); Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 Mich. L. Rev. 59, 94-104 (1966); Lynch, *Interrogation of Criminal Defendants—Some Views on Miranda* v. *Arizona*, 35 Fordham L. Rev. 221 (1966); Younger, *Interrogation of Criminal Defendants—Some Views on Miranda* v. *Arizona*, 35 Fordham L. Rev. 255 (1966); Aubrey and Caputo, *Criminal Interrogation* (1st ed. 1965).